NO. 84-1890

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CARDINAL RESOURCES, INCORPORATED,
Petitioner

versus

EDDIE STEAMSHIP COMPANY, LTD., THE OCEANUS MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., M/V PANAMAX STAR, *IN REM*, CRESCENT TOWING & SALVAGE CO., INC., AND T. SMITH & SON, INC.,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

Whether clearly foreseeable and proximately caused economic injury is recoverable where a party negligently damages a dock and loading facility, causing a user of the facility to incur additional expense in shipping its product.

INTERESTED PARTIES

1. Cardinal Resources, Inc.
   Plaintiff

2. Breazeale, Sachse & Wilson
   Attorneys for Plaintiff

3. Eddie Steamship Co., Ltd.
   Defendant

4. The Oceanus Mutual Underwriting Association (Bermuda), Ltd.
   Defendant

5. Farris, Ellis, Cutrone & Gilmore
   Attorneys for Defendants,
   Eddie Steamship Co., Ltd., and
   the Oceanus Mutual Underwriting
   Association (Bermuda), Ltd.

6. Crescent Towing & Salvage Co., Inc.
   Defendant

7. T. Smith & Son, Inc.
   Defendant

8. Courtenay, Forstall, Grace & Hebert
   Attorneys for Defendants,
   Crescent Towing & Salvage Co., Inc., and
   T. Smith & Son, Inc.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CARDINAL RESOURCES, INCORPORATED,
Petitioner

versus

EDDIE STEAMSHIP COMPANY, LTD., THE OCEANUS MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., M/V PANAMAX STAR, *IN REM*, CRESCENT TOWING & SALVAGE CO., INC., AND T. SMITH & SON, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cardinal Resources, Incorporated (Petitioners), petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit rendered on March 5, 1985.

OPINIONS BELOW

The unreported opinion of the United States District Court for the Eastern District of Louisiana, dismissing petitioner's claim on a motion for summary judgment, is reproduced in the Appendix. The *per curiam* opinion of the United States Fifth Circuit Court of Appeals, affirming the

District Court's dismissal, also is not reported, but is reproduced in the Appendix.

JURISDICTION

The judgment rendered by the United States Fifth Circuit Court of Appeals was entered March 5, 1985. This petition for certiorari was filed within 90 days of the judgment. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Eastern District of Louisiana, was predicated upon Article III, §2, United States Constitution and 28 U.S.C. §§1332, 1333.

B. Facts and Procedural History

Cardinal Resources, Inc. (Cardinal) instituted this civil action against Eddie Steamship Co., Ltd., operator of the M/V PANAMAX STAR, and its liability insurer, Oceanus Mutual Underwriting Association (Bermuda), Ltd., and T. Smith & Son, Inc., and Crescent Towing & Salvage, Inc., operators of the tug boats PROVIDENCE and JAMES E. SMITH, to recover damages sustained as a result of a maritime collision.

The facts giving rise to this action are as follows. International Marine Terminals (IMT) owns a bulk commodities facility adjacent to the west bank of the Mississippi River near Myrtle Grove, Louisiana. The facility consists of a loading, unloading and conveying system and shore storage

capacity. Cardinal had approximately 70,000 tons of coal stored at the IMT facility on December 16, 1981 when vessels operated by the defendants negligently allided with the loading and conveying system. Because of the damage, the system was inoperable for nearly three months.

In mitigation of potentially greater damages, Cardinal sold 20,000 tons of coal in January, 1982, for loading upon the M/V CONTINENTAL CHARTER. Because the IMT facility was unusable, Cardinal was required to pay $131,853.47 to have its coal loaded upon barges and then reloaded into the M/V CONTINENTAL CHARTER. Additionally, because of the conditions brought about by the respondents' negligence, Cardinal lost $257,648.79 on the sale.

Cardinal then instituted this action and defendants filed motions to dismiss and alternatively for summary judgment, contending that because of the decision in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), Cardinal was without a cause of action. The district court granted the defendants' motions for summary judgment dismissing Cardinal's complaint.

From the judgment of the district court, Cardinal appealed to the United States Fifth Circuit Court of Appeals. The case was argued before Judges Rubin, Politz and Garwood. The three-judge panel affirmed the judgment of the district court, issuing a *per curiam* opinion with a separate concurrence by Judge Rubin.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD ACT TO RESOLVE THE GROWING CONFLICT BETWEEN THE CIRCUITS OVER THE APPLICATION AND SCOPE OF *ROBINS DRY DOCK & REPAIR CO. V. FLINT*, 275 U.S. 303 (1927).

This court has long recognized that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970), *citing, The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). The court's "strong concern for uniformity" in admiralty law, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 601 (1974), is directed at maintaining the smooth flow of maritime commerce by ensuring that "all vessel operators are subject to the same duties and liabilities." *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982). Yet, at the present time, a vessel owner's liability depends upon the geography of the Federal Circuits.

Robins has been interpreted by the Fifth Circuit to mean that "a party may not recover for economic losses not associated with physical damages." *Akron Corp. v. M/T CANTIGNY*, 706 F.2d 151, *reh'g denied*, 711 F.2d 1054 (5th Cir. 1983). Due to the apparent harshness of this rule, the Fifth Circuit, and other courts, have developed a number of exceptions to the *Robins* recovery bar. The creation and application of the *Robins* exceptions in the various circuits has undermined *Robins*' utility as a "conspicuous bright-line rule." *State of La. ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc). As the circuits continue to develop and apply their own conflicting exceptions to *Robins*, this bright line becomes hazy, and the

utility of *Robins* wanes.

In the Fourth Circuit, a chemical company was held liable for economic losses suffered by commercial fisherman and local boat, tackle and bait shop owners even though there was no direct physical injury to these plaintiffs. However, plaintiffs who purchased and marketed seafood from commercial fisherman were not allowed to recover. The court, in avoiding the *Robins* rule noted that "[a]lthough subsequent cases in some circuits have applied *Robins* in a manner that would defeat plaintiffs' claims here, the United States Court of Appeals for the Fourth Circuit has significantly qualified *Robins'* reach." *Pruitt v. Allied Chemical Corp.*, 523 F.Supp. 975 (E.D. Va. 1981).

The Fifth Circuit has also carved out an exception to *Robins* for the benefit of commercial fishermen, but has not extended the exception to affected shop owners as did the court in *Pruitt. State of La. ex rel Guste v. M/V TESTBANK, supra.* The Ninth Circuit has recognized a limited exception for commercial fishermen, *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), as has a court in the 1st Circuit, *Burgess v. M/V TAMANO*, 370 F.Supp. 247 (S.D. Me. 1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977). The extent of a tortfeasor's liability in these cases was determined by the location of the accident, a result which contradicts this country's policy of a uniform admiralty law.

The Fifth Circuit has also expressed its dissatisfaction with *Robins* by expanding what it considers to be a recognizable or protectable interest in the thing damaged. In this manner the physical injury affects more plaintiffs and *Robins* therefore excludes fewer claimants. In *J. Ray McDermott & Co. v. S.S. EGERO*, 453 F.2d 1202 (5th Cir. 1972) the court

held that a pipeline construction company had "sufficient proprietary interests in the pipeline project to avoid the rule of *Robins*. . . ." *Id.* at 1204.

In the instant case, the Fifth Circuit applied Louisiana law to determine if Cardinal had a sufficient proprietary interest in the damaged property to avoid the *Robins* rule (Appendix at p. A-5). In *Louisville and Nashville Railway Company v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979), the Fifth Circuit applied Alabama law to define the plaintiff's proprietary interest. The avoidance of *Robins* by finding a sufficient proprietary interest in the physically damaged property varies from circuit to circuit, and even from state to state within each circuit. The continued application of *Robins* and the growth of state-law-determined exceptions to *Robins* is undermining the desired uniformity of admiralty law.

As exceptions to the *Robins* rule vary among the circuits, so does the consideration given the rule itself. Some circuits feel constrained by a *per se Robins* impact rule, while others have moved toward traditional tort limitations of foreseeability and proximate cause. The Second Circuit refused to apply *Robins* as an automatic bar to recovery in the well-known case of *Petition of Kinsman Transit Company*, 388 F.2d 821 (2d Cir. 1968),[1] and instead applied a traditional negligence analysis, finding that the damages sought to be recovered were too remote and only indirectly the result of defendants' negligence. The Second Circuit again noted its distaste of the *Robins* rule in *Federal Commerce & Nav. Co. v. M/V MARATHONIAN*, 528 F.2d 907 (2d Cir. 1975)

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1 In *Kinsman* the damages arose from the collision of two ships with a bridge on the Buffalo River, resulting in a damming of the river, upstream flooding, and delays to those using the river to ship their products.

(per curiam), cert. denied 425 U.S. 975 (1976). *MARATHONIAN* presented a factual situation similar to *Robins*, and both the district court and the court of appeals dismissed the plaintiffs' claims.[2] The courts clearly felt constrained by the factual similarity of the cases, and the district court wrote:

> "[W]ere this Court now free to write upon a *tabula rasa* and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis, such as that adopted by Chief Judge Kaufman in *Petition of Kinsman Transit Co.*, 388 F.2d 821, 823-34 (2 Cir. 1968). . . ." 392 F. Supp. at 913.

The Second Circuit's avoidance of *Robins* when possible, in favor of a traditional tort analysis, is not shared by the Fifth and Eleventh Circuits. In *TESTBANK*, the Fifth Circuit put to rest in its opening paragraph any thought that *Robins* would be avoided in favor of a negligence analysis:

> "We are asked to abandon physical damage to a proprietary interest as a prerequisite to recovery for economic loss in cases of unintentional maritime tort. We decline the invitation." 752 F.2d at 1020.

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2 In *Robins*, a time charterer brought suit against a dry dock company to recover loss of use of the chartered vessel. The dry dock company had negligently damaged the propeller causing the vessel to be detained for several extra days. In *MARATHONIAN*, a time charterer brought suit against the owner of a vessel which negligently collided with the chartered vessel, resulting in a loss of use and profits due to the delay necessitated by repairs.

Judges Wisdom, Rubin, Politz, Tate and Johnson dissented in *TESTBANK*, indicating that the plaintiff's claims should be "judged by our usual rules of proximate cause and foreseeability." 752 F.2d at 1045.

The Eleventh Circuit is in agreement with the Fifth, but also with numerous dissenters. In *Kingston Shipping Co., Inc. v. Roberts*, 667 F.2d 34 (11th Cir. 1982) *(per curiam), cert. denied*, 458 U.S. 1108 (1982), the Eleventh Circuit stated: "*Robins* made clear that a party may not recover for economic losses not associated with physical damages." *Id.* at 35. In *Hercules Carriers, Inc. v. State of Florida*, 720 F.2d 1201 (11th Cir. 1984) (en banc), *cert. denied* _____ U.S. _____ (1984), the court affirmed, but by an evenly divided court (6-6), the denial of purely economic damages.

In the instant case, Cardinal Resources Incorporated suffered no physical damages.[3] The dock and loading facility were owned by IMT. However, the economic damages suffered by Cardinal were clearly foreseeable, and directly caused by the negligent docking of the PANAMAX STAR. Cardinal had 70,000 tons of coal stored at the facility, and damages to the loading/unloading apparatus naturally and directly caused Cardinal's damage.

Obviously, the different approaches used by the circuits in

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3 The Fifth Circuit's *per curiam* opinion affirming the dismissal of Cardinal's claims discusses Cardinal's interest in the physically damaged dock and loading facility (Appendix at p. A-5). Since the *Robins* rule requires physical injury before economic damages are recoverable, Cardinal argued before the lower courts that it had a sufficient proprietary interest in the facility to escape the *Robins* bar. See *J. Ray McDermott & Co. v. S.S. EGERO*, 453 F.2d 1202 (5th Cir. 1972). The courts below found no proprietary interest and therefore applied *Robins* to bar Cardinal's claims. The issue concerning whether a proprietary interest exists is not presented for review.

the analysis of economic damages unaccompanied by physical impact will yield varied results from identical factual situations. The Second Circuit allows the recovery of foreseeable, purely economic proximately-caused damages, except when constrained by factual similarity to *Robins*, while the Fifth and Eleventh Circuits apply the *per-se Robins* impact rule, denying recovery of purely economic damages regardless of the connexity between tortfeasor and injured party. Liability for identical maritime torts should not vary between New York, New Orleans and Tampa Bay. Yet, at the present time there exists great variations. In light of the recentness of the declarations by the circuit courts,[4] the conflict is not likely to resolve itself. The Supreme Court should grant the writ of certiorari and return uniformity to the admiralty courts of the United States.

II. GENERAL TORT CONCEPTS SHOULD GOVERN THE RECOVERY OF ECONOMIC LOSS IN MARITIME CASES.

The irony of the application of a *per-se Robins* impact rule by the Fifth and Eleventh Circuits is evident when one considers the enormous changes in tort law since *Robins* was decided in 1927. For most of this century, courts have removed ancient and obsolete barriers to tort recovery. *See e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Yet the nearly 60 year old *Robins* decision continues to support an artificial barrier to the recovery of economic losses in maritime tort.

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4 The Second Circuit's *MARATHONIAN* was in 1975, the Fifth Circuit's *TESTBANK* was in 1985, and the Eleventh Circuit's *Kingston* and *Hercules* were in 1982 and 1984 respectively.

The *Robins* requirement of impact has become important only because it serves as a "bright line" boundary to separate immediate injury from indirect injury, supposedly weeding out tenuous claims. *TESTBANK*, 752 F.2d at 1029. As one commentator observed, "For the sake of certainty, these courts have sacrificed the fairness of a case-by-case determination of the appropriateness of recovery." Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery*, 63 Va.L.Rev. 813, 820 (1977). The application of *Robins* as a needed "bright-line" is no longer justified. The emergence in some circuits of exceptions to *Robins*[5] make its application less of a simple administrative function, and more importantly, reliance upon "impact" to separate direct from incidental claims is unnecessary. Reliance upon traditional tort principles such as foreseeability, proximate causation, and duty can serve this function more reliably and without the artificial dismissal of deserving claims.[6] *TESTBANK*, 752 F.2d at 1045 (Wisdom, J., dissenting); *Hercules*, 720 F.2d at 1205 (Clark, J., concurring specially); *Kinsman Transit*, 388 F.2d at 824.

State courts have begun to recognize the fairness of a case-by-case method of analysis, and the unnecessary artificiality of the *Robins* rule. Louisiana recently abandoned the per se exclusion of economic damages in maritime claims and substituted instead a duty-risk analysis. *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984).

Support for the *Robins* impact rule comes from those who fear that there will be a flood of litigation and unlimited

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5 **See the discussion at pages 4-6, supra.**

6 **Judge Wisdom's dissent in *TESTBANK* outlines a procedure the courts could use if allowed to proceed on a case-by-case basis, unconstrained by *Robins*. *TESTBANK* 752 F.2d at 1046.**

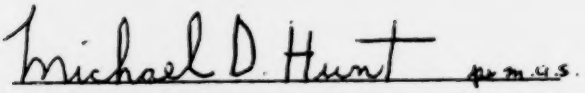
liability if economic damages are recoverable. However, it is precisely the flexibility allowed by a case-by-case analysis which prevents the recovery of damages from rising to astronomical levels because of a strange combination of events. The court can limit the defendant's losses to those that are directly foreseeable. *Kinsman*, supra. The infinite number of potential third party contract beneficiaries would have no cause of action because they were not directly damaged by the negligence of the defendant. See *Pruitt v. Allied Chemical Corp.*, 523 F.Supp. 975 (E.D. Va. 1981). Finally, in admiralty jurisdiction, the shipowner could claim the shelter of the Limitation of Liability Act, 46 U.S.C. §181 *et seq.*

CONCLUSION

Cardinal Resources suffered foreseeable economic injury when the M/V PANAMAX STAR negligently allided with the IMT dock and loading facility. Because the facility is located in Louisiana rather than New York, Cardinal cannot recover. *Robins*, as applied in the Fifth Circuit serves as an automatic bar to Cardinals' claim, *regardless* of the connection between Cardinal's damages and the tortfeasor's negligence.

Federal courts regularly deal with traditional tort concepts of foreseeability, proximate cause, and duty, and are capable of determining on a case-by-case basis the merit of claims for purely economic damages resulting from maritime torts. Cardinal should be permitted the opportunity to prove their claim. Accordingly, Cardinal Resources, Incorporated respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



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PROOF OF SERVICE

I, Michael D. Hunt, attorney for Cardinal Resources, Incorporated, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 3rd day of June, 1985, I served the foregoing petition for a writ of certiorari, and its appendices on Eddie Steamship Co., Ltd., and The Oceanus Mutual Underwriting Association (Bermuda), Ltd., respondents in connection with this application for a writ of certiorari, by mailing three copies thereof to their counsel of record, Gary A. Lee, Esquire, 1207 Whitney Bank Building, New Orleans, Louisiana 70130-2657, and upon Crescent Towing & Salvage Co., Inc., and T. Smith and Son, Inc., respondents in connection with this application for a writ of certiorari, by mailing three copies thereof to their counsel of record, F.A. Courtenay, Jr., 730 Camp Street, New Orleans, Louisiana 70130.

Michael D. Hunt

Michael D. Hunt

MINUTE ENTRY:
HEEBE, J.
August 31, 1983

INTERNATIONAL MARINE TERMINALS

VERSUS

EDDIE SS CO. LTD

Filed September 6, 1983

: MOTION OF CRESCENT TOWING & SALVAGE CO., INC. AND T. SMITH AND SON, CO. TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

MOTION OF EDDIE S.S. CO., LTD. AND THE OCEANUS MUTUAL UNDERWRITING ASSOCIATION TO DISMISS

The above motion was brought on for hearing on the Court's docket this date, and the Court ruled as follows:

ARGUMENT, MOTIONS GRANTED, COUNSEL TO PREPARE FINAL JUDGMENT UNDER RULE 54B

Present: THEODORE W. BRIN, ATTY.
GARY A. LEE, ATTY.
MICHAEL D. HUNT, ATTY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL MARINE TERMINALS

VERSUS

EDDIE STEAMSHIP CO., LTD., *in personam*, OCEANUS MUTUAL UNDERWRITING ASSOCIATION, LTD., *in personam*, and the M/V PANAMAX STAR, *in rem*

CONSOLIDATED WITH

CARDINAL RESOURCES, INC.

VERSUS

EDDIE STEAMSHIP CO., LTD., THE OCEANUS MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., M/V PANAMAX STAR, *in rem*, CRESCENT TOWING & SALVAGE CO., INC., and T. SMITH & SON, INC.

CIVIL ACTION NO. 83-1572
SECTION: "B"(5)

JUDGMENT

Filed October 27, 1983

Crescent Towing & Salvage Co., Inc. and T. Smith & Son, Inc. brought a Motion to Dismiss the claims of Cardinal Resources, Inc., or, alternatively, for Summary Judgment. Eddie Steamship Co., Ltd. and The Oceanus Mutual Under-

writing Association (Bermuda), Ltd. filed a similar Motion. Oral argument by counsel occurred on August 31, 1983. The Court considers the Motions to be for Summary Judgement. Having considered the argument and briefs of counsel, the pleadings, Answers to Interrogatories, and Admissions on file, together with the Affidavits, the Court finds that there is no genuine issue as to any material fact and that Crescent Towing & Salvage Co., Inc., T. Smith & Son, Inc., Eddie Steamship Co., Ltd. and The Oceanus Mutual Underwriting Association (Bermuda), Ltd. are entitled to Summary Judgment in their favor as a matter of law.

Considering the foregoing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment of Crescent Towing & Salvage Co., Inc., T. Smith & Son, Inc., Eddie Steamship Co., Ltd. and The Oceanus Mutual Underwriting Association (Bermuda), Ltd. are granted and, there being no just reason for delay, it is hereby directed that a final Judgment pursuant to Federal Rule of Civil Procedure 54(b) be entered, dismissing all the claims of Cardinal Resources, Inc. and dismissing the Complaint of Cardinal Resources, Inc., with prejudice, and at its costs.

New Orleans, Louisiana, this 27th day of October, 1983.

/s/ Frederick Heebe
UNITED STATES DISTRICT JUDGE

Approved as to form:
/s/ Michael D. Hunt

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3744

CARDINAL RESOURCES, INC.,
Plaintiff-Appellant,

versus

EDDIE STEAMSHIP CO., LTD., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

(March 5, 1985)

Before RUBIN, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:*

Cardinal Resources, Inc. appeals an adverse summary judgment dismissing its claim for economic damages resulting from a maritime collision. Concluding that the rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), as most recently explicated in *State of Louisiana v. M/V Testbank*, _____ F.2d _____, No. 82-3059 (5th Cir. 1985)

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

(en banc), precludes recovery as a matter of law, we affirm.

Background

On December 18, 1981, loading facilities owned by International Marine Terminal (IMT), located on the west bank of the Mississippi River near Myrtle Grove, Louisiana, were damaged during the docking of the M/V PANAMAX STAR. Cardinal Resources had contracted with IMT to have its coal unloaded from barges for immediate transfer to seagoing vessels if available or storage and subsequent transfer to seagoing vessels. As a result of the damage, pending repairs the IMT facility could not be used to transfer coal directly to seagoing vessels; instead it was necessary to load the coal onto barges for transfer to the larger vessels. Cardinal sued the owners of the PANAMAX STAR and the owners of the tug PROVIDENCE, which had assisted in the docking, for the economic losses it incurred as a result of the damage to IMT's facility. The district court granted defendants' motion for summary judgment, *citing Robins Dry Dock & Repair Co. v. Flint*. In their appeal Cardinal Resources contends that its agreement with IMT was a lease giving them a proprietary interest in the damaged facility, thus rendering the prescript of *Robins Dry Dock* inapplicable.

Lease or Contract of Deposit?

Cardinal Resources argues that their agreement with IMT was in actuality a lease which gave them a proprietary interest in the damaged facility. The defendants counter with the argument that the agreement was a contract for deposit, a bailment at common law, and additional services. Under Louisiana law, which is applicable to resolution of the contractual issue, *see Louisville & Nashville Railroad v. M/V Bayou LaCombe*, 597 F.2d 469 (5th Cir. 1979), the primary distinction between a lease of storage space and a

contract of deposit turns on the issue of custody and control of the stored goods. *Grabert v. James C. Noel Flying Service, Inc.*, 360 So.2d 1363 (La. App. 1978); *St. Paul Fire and Marine Insurance Co. v. Zurich Insurance Co.*, 250 So.2d 451 (La. App. 1971). When the owner of the goods is assigned a specific storage space, is responsible for moving its goods into and out of that space, and has free access to the assigned area, the contract is usually characterized as a lease. On the other hand, when the owner of the storage facility has the right to move the owner's goods freely within the facility and is responsible for moving the goods into and out of the facility, concomitantly limiting access to the facility by the owner of the goods, the contract is usually characterized as one of deposit. *Id.*

The record reflects that IMT agreed to store up to 60,000 tons of coal for Cardinal Resources, but no specific space was assigned to Cardinal Resources. IMT retained the right to move Cardinal's coal from space-to-space within its facility at its sole discretion. IMT was responsible for the unloading of the coal from Cardinal's barges, its movement into the facilities for storage, and its subsequent movement from storage and loading onto seagoing vessels. There is no indication that Cardinal had free access or even consequential access to the area in which IMT stored the coal. The contract clearly contemplated that IMT would take possession and control of Cardinal's coal during storage. We conclude that the contract is a deposit and not a lease.

A contract of deposit does not give the depositor a proprietary interest in the facility in which the goods are stored. Cardinal's lack of a proprietary interest in the IMT facility which was physically damaged bars its recovery for the economic losses sustained. *Robins Dry Dock & Repair Co. v. Flint; State of Louisiana v. M/V Testbank.*

The judgment of the district court is AFFIRMED.

No. 83-3744 - Cardinal Resources v. Eddie Steamship Co.

Rubin, J., concurring

While I agree that this result is compelled by the en banc decision in State of Louisiana v. M/V Testbank, _____ F.2d _____, No. 82-3059 (5th Cir. 1985) (en banc), I continue to adhere to the views expressed in the dissenting opinions in that case.